Supreme Court, U.S.
FILED
MAY 6 1986
JOSEPH F. SPANIOL, JR.
CLERK

85-1820

No. .....

In The

Supreme Court of the United States

October Term, 1985

JUNIOR RAY DUCKWORTH, et al.,

Petitioners,

v.

GAYLE FRANZEN, et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

J. STEVEN BECKETT
RENO, O'BYRNE & KEPLEY, P.C.
P.O. Box 693
Champaign, IL 61820

JOHN L. SWARTZ
GIFFIN, WINNING, LINDNER, COHEN & BODEWES, P.C.
P.O. Box 2117
Springfield, IL 62705

REX L. REU
LOREN THOMSON
THOMSON, WEINTRAUB & THOMPSON
P.O. Box 3577
Bloomington, IL 61702

JEFFREY D. FREDERICK
JOHNSON, FRANK, FREDERICK & WALSH
129 West Main
Urbana, IL 61801

COUNSEL FOR PETITIONERS

COCKLE LAW BRIEF PRINTING CO., (800) 835-7427 Ext. 333

44 pp

QUESTIONS PRESENTED

1. Whether the Seventh Circuit opinion erroneously adopted a standard of "criminal recklessness" in lieu of "deliberate indifference" as controlling in Eighth Amendment civil rights claims regarding prisoners' conditions of confinement.

2. Whether the Seventh Circuit abrogated its appellate function and improperly applied a newly pronounced doctrine of "criminal recklessness", instead of remanding to the district court for a new jury trial.

PARTIES TO THE PROCEEDING

The petitioners are Junior Ray Duckworth, Michael A. Mullins, William Woodward, Daniel Hines, Freddie Brown, Emmett Leatherwood, Rudolph Moffett, Ben Cantrell and Robert Osborne.

The respondents are Gayle M. Franzen, Dennis J. Wolff, and Richard R. Hert.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PARTIES TO THE PROCEEDING	i
OPINION BELOW	2
JURISDICTION	2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	3
STATEMENT OF THE CASE	3
REASONS FOR GRANTING THE WRIT	
I. TO ESTABLISH A VIOLATION OF RIGHTS SECURED BY THE EIGHTH AMENDMENT, STATE PRISON INMATES CHALLENGING THEIR CONDITIONS OF CONFINEMENT IN A CIVIL RIGHTS SUIT UNDER 42 U.S.C. § 1983 NEED ONLY ESTABLISH THAT PRISON AUTHORITIES ACTED WITH "DELIBERATE INDIFFERENCE" TO THE PRISONERS' NEEDS, NOT THAT THOSE AUTHORITIES WERE "RECKLESS IN THE CRIMINAL LAW SENSE."	6
II. PLAINTIFFS WERE ENTITLED TO A NEW TRIAL ON THE SEVENTH CIRCUIT'S NEWLY PRONOUNCED STANDARD OF "CRIMINAL RECKLESSNESS".	10
CONCLUSION	13

APPENDIX INDEX

	Page
Opinion of the 7th Circuit Court of Appeals	App. 1
Denial of Petitions for Rehearing en banc	App. 24

TABLE OF AUTHORITIES

Page

CASES:

Adamson v. Gilliland, 242 U.S. 350 (1917) 11

Aetna Casualty Co. v. Flowers, 380 U.S. 464 (1947) 2

Anderson v. City of Atlanta, 778 F.2d 678 (11th Cir. 1985) 7

Byrd v. Blue Ridge Rural Electric Cooperative, 365 U.S. 525 (1958) 11

Carr v. Zaja, 283 U.S. 52 (1931) 2

Estelle v. Gamble, 429 U.S. 97 (1976) 6, 7, 8, 9, 10

Haygood v. Younger, 769 F.2d 1350 (9th Cir. 1985) 7

Iacurci v. Lummus Company, 387 U.S. 86 (1967) 12

Inwood Laboratories, Inc. v. Ives Laboratories Inc., 456 U.S. 844 (1982) 11, 12

Kelley v. Southern Pacific Company, 419 U.S. 318 (1974) 11

Miller v. Solem, 728 F.2d 1020 (8th Cir. 1984), cert. denied 105 S.Ct. 145 (1984) 8

Pullman-Standard v. Swint, 456 U.S. 273 (1982) 11

Riley v. Jeffes, 777 F.2d 143 (3rd Cir. 1985) 7

Roberts v. City of Troy, 773 F.2d 720 (6th Cir. 1985) 7, 9

Whitley v. Albers, — U.S. —, 106 S.Ct. 1078 (1986) 6, 8, 9, 10

TABLE OF AUTHORITIES—Continued

Page

STATUTES:

28 U.S.C. § 1241(1) 2

42 U.S.C. § 1983 ..... 6, 7, 10

CONSTITUTION:

Eighth Amendment Constitution of the United States ..... passim

No. .....

—o—

In The

Supreme Court of the United States

October Term, 1985

—o—

JUNIOR RAY DUCKWORTH, et al.,

Petitioners,

v.

GAYLE FRANZEN, et al.,

Respondents.

—o—

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

—o—

Petitioners respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered in this proceeding on December 17, 1985. Petitioners' timely filed petition for rehearing, with suggestion for rehearing *en banc* was denied by the court on February 5, 1986.

—o—

OPINION BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit is reported at 780 F.2d 645 (1985), and a copy is included in the Appendix as Exhibit A.

———o———

JURISDICTION

Jurisdiction in this cause is premised upon 28 U.S.C. § 1241(1), for review by certiorari of the judgment and opinion of the United States Court of Appeals for the Seventh Circuit. A written opinion was issued by that court on December 17, 1985. Petitioners filed a petition for rehearing, with suggestion for rehearing *en banc*. That petition was denied on February 5, 1986, and a copy of the order denying rehearing *en banc* is included in the Appendix as Exhibit B.

The record in this cause was lodged with the Clerk of the United States District Court for the Southern District of Illinois, Alton, Illinois, on March 7, 1986, with the return of the mandate to that court. Although the mandate has issued, the United States Supreme Court has jurisdiction to review the decision of the United States Court of Appeals regardless of the status of the mandate. *Carr v. Zaja,* 283 U.S. 52, 53 (1931); *Aetna Casualty Co. v. Flowers,* 330 U.S. 464, 468 (1947).

———o———

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Eighth Amendment
Constitution of the United States

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

———o———

STATEMENT OF THE CASE

Petitioners were all prison inmates being transported on an over-the-road bus on November 29, 1979, by the Illinois Department of Corrections. The trip had originated at the Joliet Correctional Facility, and thirty-five prisoners in the custody of the department were on board the bus when it caught fire on the grounds of the Vandalia Correctional Center. The bus had been acquired and modified through actions of the respondents Wolff and Hert. All emergency exits were sealed, the windows were barred and closed, and a mesh screen was placed at the front of the bus with a door that was latched from the outside. The prisoners were chained together in two groups, one on each side of the bus, by a chain which ran down between the seats on each side through a ring in each pair of handcuffs that secured two prisoners.

At 1:00 p.m. on November 29th, the bus caught fire while it was parked within the gates and grounds of the Vandalia Correctional Center. None of the prisoners were evacuated from the bus when the fire started. After dense

smoke filled the bus, the two groups of prisoners panicked and in attempting to exit the bus, they became jammed and stacked at the front gate. One prisoner was killed and the others incurred varying degrees of respiratory injuries.

On the date of the occurrence, the transfer of prisoners between institutions in the Illinois Department of Corrections was governed by a Security Procedures Manual dated September 16, 1979, which had been drawn at the direction of respondent Hert and approved by him and respondent Wolff. This manual set forth the methods by which prisoners were to be organized for shipment, their feeding prior to and during transfer, the handling of prisoners' personal property, and the methodology of securing the prisoners within the bus, as described above. The manual contained the following provision regarding fire:

> FIRE:
>
> MINOR: A minor fire should be extinguished immediately. If no resident is injured or structual [sic] damage affecting the operation of the bus, the transfer should continue.
>
> MAJOR: A fire which cannot be extinguished immediately should result in the orderly removal of residents from the bus. Residents should be removed to an open area a sufficient distance from the bus so as to avoid injury from an explosion. Under no circumstances should the restraining devisces [sic] be removed unless a resident's life is in immediate danger. The State Police and the closest correctional institution should be notified by radio. Procedures identified above for the continuance or transportation to the closest correctional institution of the residents

should be followed. A thorough report should be submitted to the Joliet Correctional Center.

During the November 29, 1979 transfer, these procedures were followed. No drills or instructions were given to the prisoners regarding emergency situations, nor had the prison guards accompanying the bus, Tipton, Krug and Hartgrove, (defendants in the district court proceedings) received any training regarding what to do in the event of an emergency.

Petitioners filed a civil suit, basing their claim on the Eighth Amendment to the Constitution of the United States pertaining to the conditions of their confinement, specifically the transportation procedures utilized and the security modifications made to the bus. The three administrative correctional officers, Franzen, Wolff and Hert, were named defendants, as well as the transfer guards, Hartgrove, Krug and Tipton. Petitioners' pendent common law claims against all six defendants were dismissed prior to trial by the district court.

After trial in the district court on the civil rights claim, District Judge William Beatty presiding, a jury awarded money judgments to the petitioners based on their Eighth Amendment claims against respondents Franzen, Wolff and Hert, but found no liability for defendants Hartgrove, Krug and Tipton. The defendant correctional officials appealed the judgment in favor of 21 plaintiffs, in which the jury awarded a total of $561,000 in compensatory and punitive damages. Petitioners cross-appealed on the issue of the dismissal of their pendent state claims.

On December 17, 1985, the Seventh Circuit Court of Appeals reversed the verdicts and judgments awarded to petitioners. The court held that the Eighth Amendment

was designed to prevent cruel and unusual punishment, and under the court's interpretation, to recover money damages petitioners would have to establish "criminal recklessness" on the part of defendants which, in its view, was not supported by the record. On the cross-appeal, the court held that the district court erred in dismissing the pendent state claims, and remanded those claims to the district court.

Both petitioners and respondents filed petitions for rehearing with suggestion for rehearing *en banc*. On February 5, 1986, the court denied both petitions.

REASONS FOR GRANTING THE WRIT

I.

TO ESTABLISH A VIOLATION OF RIGHTS SECURED BY THE EIGHTH AMENDMENT, STATE PRISON INMATES CHALLENGING THEIR CONDITIONS OF CONFINEMENT IN A CIVIL RIGHTS SUIT UNDER 42 U.S.C. § 1983 NEED ONLY ESTABLISH THAT PRISON AUTHORITIES ACTED WITH "DELIBERATE INDIFFERENCE" TO THE PRISONERS' NEEDS, NOT THAT THOSE AUTHORITIES WERE "RECKLESS IN THE CRIMINAL LAW SENSE."

This case provides the Court with a significant opportunity to clarify the mental state necessary to support an Eighth Amendment challenge to prisoners' conditions of confinement. Until the decision this term in *Whitley v. Albers*, — U.S. —, 106 S.Ct. 1078 (1986), the "deliberate indifference" standard of *Estelle v. Gamble*,

429 U.S. 97 (1976), served as the yardstick by which Eighth Amendment claims were measured. Applying that standard in this case, the Seventh Circuit Court of Appeals held that "the infliction of suffering on prisoners can be found to violate the Eighth Amendment only if that infliction is either deliberate, or reckless in the criminal law sense." 780 F.2d at 652-653. This conclusion represents a major deviation from *Estelle,* and creates a conflict among the Circuit Courts of Appeal as to the meaning of "deliberate indifference."

In *Estelle,* a state prisoner sued various Texas correctional officials under the Civil Rights Act of 1871, 42 U.S.C. § 1983, claiming that he had been denied adequate medical care. This Court concluded that "deliberate indifference to serious medical needs of prisoners" constituted the "unnecessary and wanton infliction of pain" proscribed by the Eighth Amendment, giving rise to a civil rights cause of action. 429 U.S. at 104-105.

While *Estelle* arose in the context of medical care, the "deliberate indifference" standard has been applied by lower courts to a wide variety of Eighth and Fourteenth Amendment circumstances. *Riley v. Jeffes,* 777 F.2d 143 (3rd Cir. 1985), (prison violence); *Anderson v. City of Atlanta,* 778 F.2d 678 (11th Cir. 1985), and *Roberts v. City of Troy,* 773 F.2d 720 (6th Cir. 1985), (conditions of pretrial detention); *Haygood v. Younger,* 769 F.2d 1350 (9th Cir. 1985), (miscalculation of prisoner release date). Those courts that have deemed it necessary to define the term have equated "deliberate indifference" with "gross negligence", (*Anderson v. City of Atlanta, supra, Roberts v. City of Troy, supra*), or "recklessness",

(*Miller v. Solem*, 728 F.2d 1020 [8th Cir. 1984], cert. denied 105 S.Ct. 145 [1984]).

In *Whitley v. Albers*, — U.S. —, 106 S.Ct. 1078 (1986), this Court carved out an exception to the *Estelle* standard of "deliberate indifference". In those cases where prison authorities are confronted with a disturbance requiring the use of force to restore order, their actions are judged by a stricter measure:

> [W]hether the use of force could plausibly have been thought necessary, or instead evinced such wantonness with respect to the unjustified infliction of harm as is tantamount to a knowing willingness that it occur.
>
> 106 S.Ct. at 1085.

The Court did not abandon "deliberate indifference" in *Whitley;* rather Justice O'Connor's opinion deemed that standard "appropriate" in the *Estelle* context. 106 S.Ct. at 1084. The *Whitley* test is for those factual settings where a court is asked "to critique in hindsight decisions necessarily made in haste, under pressure, and frequently without the luxury of a second chance." 106 S.Ct. at 1085.

In this case, the prison administrators made conscious, deliberate decisions as to the bus modifications. Those decisions were made neither in haste nor under pressure. The end result was a bus that, in Warden Wolff's phrase, was "a penitentiary on wheels." Likewise, the decision to cuff and shackle the prisoners together aboard the bus was not made in the heat of a crisis. The transfer procedures were developed over time at the direction of Major Hert, approved by Warden Wolff, and reduced to written form in a manual. Unlike *Whitley*, this case did not arise out of a prison disturbance or riot; there were no hostages and no weapons in the prisoners' hands. This suit raised

a challenge to the means and procedures by which the prisoners were confined during their transfer, and the authorities' failure to take elementary precautions against fire hazards. As such, this is a "conditions of confinement" case, for which *Whitley* suggests that the applicable standard is still "deliberate indifference" under *Estelle*. See 106 S.Ct. at 1084.

This Court did not define "deliberate indifference" in *Estelle,* or any subsequent decision. The Seventh Circuit has now held that it means "reckless in the criminal law sense", and that "gross negligence is not enough." 780 F.2d at 652-653. This holding creates a sharp conflict with the Sixth Circuit, where "gross negligence" is enough. *Roberts v. City of Troy,* 773 F.2d 720 (6th Cir. 1985). If "deliberate indifference" is still a viable concept (as *Whitley* suggests), the Court now has a fitting occasion to clarify its meaning and give guidance to lower courts in the conduct of Eighth Amendment litigation.

Additionally, this Court should accept this case for review to further define the scope of its holding in *Whitley*. The *Whitley* opinion cites the decision of the Court of Appeals in this case, unfortunately describing it as an "Eighth Amendment case involving security risks." 106 S.Ct. at 1085. That characterization is not totally accurate. Virtually every "conditions" case has "security" implications. There is no doubt that the transfer bus in this case was secure; however, it also posed obvious hazards to the occupants in the event of fire or accident. The troubling implication of the Court's citation is that the higher standard of "wantonness" pronounced in *Whitley* may be extended to "conditions" cases, effectively overwhelming the *Estelle* standard.

This case identifies an issue deserving of clarification to determine whether the "deliberate indifference" standard of *Estelle* has, in fact, survived the decision in *Whitley*. If it has, there is a compelling need for guidance as to its specific meaning. For these reasons, the writ should be granted.

II.

PLAINTIFFS WERE ENTITLED TO A NEW TRIAL ON THE SEVENTH CIRCUIT'S NEWLY PRONOUNCED STANDARD OF "CRIMINAL RECKLESSNESS".

Plaintiffs, all prison inmates injured in a prison transfer bus fire, filed a complaint seeking relief under the Eighth Amendment and the federal Civil Rights Act, 42 U.S.C. § 1983, alleging "deliberate indifference" as the controlling standard for their conditions of confinement case. Discovery was completed under that standard, and pre-trial motions were ruled upon under that standard. The trial court granted a motion *in limine* preventing plaintiffs from adducing evidence about modifications to the prison bus and changes in transfer procedures after the tragic fire of November 29, 1979, because such evidence was not probative of the standard of "deliberate indifference". Thus, the evidence that was adduced, and all evidentiary rulings at trial, were made in light of that standard. Closing arguments were made to the jury, and the jury was instructed, under the standard of "deliberate indifference". Finally, defendants' post-trial motions were denied because of the application of "deliberate indifference".

On appeal, the Seventh Circuit held that the standard of "deliberate indifference" was erroneous and that in-

deed, a standard of "reckless in the criminal sense" should be applied to this case. The Seventh Circuit proceeded to analyze the factual record in the case and arrived at the conclusion that based on that record, plaintiffs had not met the newly promulgated standard. Accordingly, the court dismissed plaintiffs' civil rights complaint and gave judgment to defendants. It is respectfully submitted that the Seventh Circuit decision is a shocking and incomprehensible piece of improper judicial activism.

This Court has long been wary of appellate courts substituting their view of the facts and the case for the views of the trier of fact at the district court level. Justice Holmes, in *Adamson v. Gilliland,* 242 U.S. 350 (1917) recognized that the Eighth Circuit Court of Appeals had erroneously substituted its view of conflicting evidence for that of the district court. He held such activity by an appellate court to be improper. In recent years, the Supreme Court has continuously recognized that in cases where an incorrect legal standard has been applied resulting in a reversal on appeal, "the best course at this point is to require the trier of fact to re-examine the record in light of the proper legal standard." *Kelley v. Southern Pacific Company,* 419 U.S. 318, 332 (1974). Recognition of the proper appellate function of a Court of Appeals is of special importance where a plaintiff has exercised his right to a jury trial, according to this Court, for such a plaintiff "is plainly entitled to have an opportunity to try the issue under the Court of Appeals' interpretation" to a jury. *Byrd v. Blue Ridge Rural Electric Cooperative,* 356 U.S. 525, 532 (1958). See also, *Pullman-Standard v. Swint,* 456 U.S. 273, 290-293 (1982). *Inwood Laboratories, Inc.*

v. Ives Laboratories, Inc., 456 U.S. 844, 857 n. 19 (1982); *Iacurci v. Lummus Company*, 387 U.S. 86, 88 (1967).

Inherent in the sound rulings of this Court regarding the proper exercise of reviewing power by the Circuit Courts of Appeal is a recognition that jury verdicts necessarily depend upon the credibility of witnesses and the traditional factfinding process. Appellate courts must not attempt to decide as an original matter whether the jury's verdict is appropriate in their view. If in fact an error of law has occurred that still permits a weighing and factfinding process, that function under our constitutional system belongs to the jury and not to the Court of Appeals.

A review of pages 653-656 of the reported decision in this case demonstrates a new type of deliberation and factfinding process. The Court of Appeals summarizes what it would do if it were a jury determining the facts under a newly announced standard of "criminal recklessness". The court makes such statements as "here no history of accidents conveyed an unmistakable warning that the expected accident cost if no further precautions were taken was very high", and "not only was the perceived danger not great but the means of adverting it were not simple, obvious or cheap." As much as the Seventh Circuit apparently disagrees with the jury verdict in this case, that court could not see the witnesses and hear their testimony. Their function was a review on the record.

It is respectfully submitted that the Seventh Circuit cast power to itself not available under the Constitution and laws of the United States. The court certainly had

the power to determine the correct legal standard under the Eighth Amendment, but it lacked the power to resolve the conflicting facts under that newly announced standard. The opinion below is a startling imposition akin to an *ex post facto* law. This Court should recognize the inherent flaw in the action taken by the Seventh Circuit and order a remand of this cause to the district court for a new jury trial.

—o—

CONCLUSION

This conditions of confinement civil rights case presents issues of recurring significance and importance. The questions of the proper Eighth Amendment standard for the imposition of monetary liability and, in the alternative, application of a newly pronounced standard without a remand, are vital ones that should receive examination by this Court. The combination of these issues certainly warrants this Court's attention and a grant of certiorari to resolve them.

Respectfully submitted,

J. Steven Beckett
Reno, O'Byrne & Kepley, P.C.
P.O. Box 693
Champaign, IL 61820

John L. Swartz
Giffin, Winning, Lindner Cohen & Bodewes, P.C.
P.O. Box 2117
Springfield, IL 62705

Rex L. Reu
Loren Thomson
Thomson, Weintraub & Thomson
P.O. Box 3577
Bloomington, IL 61702

Jeffrey D. Frederick
Johnson, Frank, Frederick & Walsh
129 West Main
Urbana, IL 61801

Counsel for Petitioners

May, 1986

APPENDIX

EXHIBIT A

Junior Ray DUCKWORTH, et al.,
Plaintiffs-Appellees,
Cross-Appellants,

v.

Gayle FRANZEN, et al.,
Defendants-Appellants,
Cross-Appellees.

Nos. 85-1010, 85-1053, 85-1084 and 85-1095

United States Court of Appeals, Seventh Circuit.

Argued Oct. 31, 1985.

Decided Dec. 17, 1985.

Prisoners, who sustained injuries when bus in which they were chained caught fire, brought section 1983 action against prison officials. The United States District Court for the Southern District of Illinois, William L. Beatty, J., entered judgment in favor of prisoners, and both appeal and cross appeal were taken. The Court of Appeals, Posner, Circuit Judge, held that: (1) prison officials were sued in their individual capacities, such that Eleventh Amendment did not apply; (2) conduct of prison officials in regard to bus accident did not amount to "punishment" for Eighth Amendment purposes, and thus, they incurred no civil rights liability; but (3) district court should not have dismissed pendent state negligence claim, and would be required to retain that claim unless prison officials waived statute of limitations defense.

Reversed and remanded.

Before BAUER, POSNER and EASTERBROOK, Circuit Judges.

POSNER, Circuit Judge.

In November 1979 a bus used to transport prisoners between Illinois prisons caught fire from unknown causes. When the fire broke out, the 35 prisoners in the bus were in handcuffs, with all the prisoners on each side of the aisle being joined together by a chain running through the handcuffs. For reasons of security all exits but the front door of the bus had been sealed and there was a metal screen (like a mesh fence), probably locked (but the record is not clear on this), between the passenger area and the front door. When the bus filled with dense smoke each group of prisoners tried to rise and make its way to the front exit, but only one prisoner (who had managed to slip out of his handcuffs) succeeded in getting out, and a guard thrust him back into the bus. Eventually guards equipped with gas masks cut through the chains and brought the prisoners out. One prisoner died from the ordeal. Others suffered serious, and in at least one case permanent, lung injury. Twenty-one of the injured prisoners brought suit against three prison officials and three guards under section 1 of the Civil Rights Act of 1871 (now 42 U.S.C. § 1983), charging that by failing to take effective precautions against the consequences of a fire on the bus the defendants had visited cruel and unusual punishment on the plaintiffs in violation of the Eighth Amendment, which has been held applicable to the states under the due process clause of the Fourteenth Amendment. The complaint included a pendent claim against these six defendants for

negligence and a diversity claim based on products liability against a seventh defendant, the manufacturer of the bus.

The district judge severed the claim against the bus company, and it remains in the district court, awaiting trial. He dismissed the pendent claim. The civil rights claim was tried to a jury, which awarded damages totaling $561,000 (including punitive damages) against three of the defendants—Franzen, the head of the Illinois prison system at the time of the fire; Wolff, the then warden of Joliet prison, the distribution point for prisoners entering the Illinois prison system and the place where the bus was kept; and Hert, the then director of security at Joliet—but exonerated the three guards who had been in charge of the bus when the fire occurred. Although the judgment is not final in the sense of winding up the entire litigation—for the plaintiffs' claim against the bus company has yet to be tried—the judge quite properly has certified the judgment for an immediate appeal under Rule 54(b) of the Federal Rules of Civil Procedure. It disposes, with finality in the district court, of the claims against the other defendants, and they should not have to wait until the case against the bus company is concluded to get a definitive determination of their liability.

The three defendants who were found liable argue mainly that the plaintiffs' suit is barred by the Eleventh Amendment and that in any event no reasonable jury could have found them guilty of inflicting cruel and unusual punishment. The plaintiffs, cross-appealing from the dismissal of the pendent claim, argue that the district judge was wrong to think it barred by the Eleventh Amendment, especially when the judge thought the Eleventh Amend-

ment no bar to the civil rights claim. Several of the plaintiffs also challenge the jury's award of damages to them, as too low.

The defendants say they were sued in their official capacities, making this a suit against the state. If you believe that a state officer has violated your constitutional rights, you have a choice between suing the officer personally and suing the state. If you go the former route you don't have to worry about the Eleventh Amendment but do have to worry about various personal defenses, such as goodfaith immunity; if you go the latter route you don't have to worry about personal defenses but may have to worry about the Eleventh Amendment. See *Kentucky v. Graham,* — U.S. —, 105 S.Ct. 3099, 3105-06, 87 L.Ed.2d 114 (1985). A suit against an official in his official rather than individual capacity is a suit against the state. See *id.,* 105 S.Ct. at 3105; *Brandon v. Holt,* — U.S. —, 105 S.Ct. 873, 878, 83 L.Ed.2d 878 (1985).

The complaint named Franzen "in his capacity as Director of the Illinois Department of Corrections," but Wolff and Hert merely as "Former Warden of the Joliet Correctional Center" and "Former Chief of Security" at Joliet, respectively, and the three guards just as "Officers of the Illinois Department of Corrections." The same designations appear in the part of the complaint that asks for damages. All this might seem to clinch the case for regarding the suit against Franzen, at least, as an official-capacity suit and hence barred by the Eleventh Amendment; for section 1983 did not abrogate the states' Eleventh Amendment immunity from damage suits, *Owen v. Lash,* 682 F.2d 648, 654 (7th Cir.1982), and Illinois has

not waived that immunity. Although the Eleventh Amendment, read literally, forbids the federal courts to exercise jurisdiction over any suit by a citizen against a state, they may do so if the state consents, *Alabama v. Pugh*, 438 U.S. 781, 782, 98 S.Ct. 3057, 3058, 57 L.Ed.2d 1114 (1978) (per curiam)—a rare example of the conferral of subject-matter jurisdiction by consent.

Not only suing a defendant in his official capacity, but even just naming the defendant's office, raises a presumption that is being sued only in his official capacity. See, e.g., *Kolar v. County of Sangamon*, 756 F.2d 564, 568-69 (7th Cir. 1985); *Wolf-Lillie v. Sonquist*, 699 F.2d 864, 869-70 and n. 12 (7th Cir.1983). It suggests that the plaintiff is really after the employer, which is to say the state or a state agency. But the presumption cannot be conclusive in a system such as the Federal Rules of Civil Procedure create, in which the complaint does not fix the plaintiff's rights but may be amended at any time to conform to the evidence. See Fed. R.Civ.P. 15(b); *Regents of the University of Michigan v. Ewing*, — U.S. —, 106 S.Ct. 507, 511 n. 6 (1985); *Phillips v. Vandygriff*, 711 F.2d 1217, 1225 n. 9 (5th Cir. 1983). Whatever the plaintiffs may have had in mind when they named Franzen "in his capacity as Director" of the Illinois prison system, the case was tried as a suit against the defendants as individuals. This is shown most dramatically by the fact that the judge, at the defendants' request, instructed the jury that all of the defendants were being sued as individuals, that they were liable only for their personal acts or omissions to act, and that neither the State of Illinois nor the Illinois Department of Corrections was a defendant.

The defendants do not argue that the form of the complaint misled them. Bear in mind that Franzen resigned as Director of the Illinois Department of Corrections while the suit was in progress, while Wolff and Hert had already resigned from the offices named in the complaint. If the state attorney general's office, which represents state officials whether sued in their official or individual capacities, had thought this a suit against Franzen or Wolff or Hert in their official capacities, we do not understand why it did not move in either the district court or this court to substitute their successors in office as defendants in their place. See Fed.R.Civ.P. 25(d)(1); Fed.R.App.P. 43(c). We hold that substance trumps form and that all the defendants were sued in their individual capacites. That this issue may not recur we urge counsel for civil rights plaintiffs when they are suing a state officer in his individual capacity to say so plainly; and if in both his individual and official capacities to make that unmistakably clear, too. *Kolar v. County of Sangamon, supra,* 756 F.2d at 568-69.

But being sued in their individual capacities the defendants could be held liable only for their individual wrong-doing. Section 1983 does not recognize a doctrine of superiors' liability. *McKinnon v. City of Berwyn,* 750 F.2d 1383, 1390 (7th Cir. 1984). Such a doctrine would be analogous to respondeat superior, which makes the employer, as distinct from a superior employee, liable for an employee's tort—and which is also unavailable in suits under section 1983. *Monell v. New York City Dept. of Social Services,* 436 U.S. 658, 691-94, 98 S.Ct. 2018, 2036-37, 56 L.Ed.2d 611 (1978). So Franzen could not be held liable for the torts of his subordinates in the Department of Cor-

rections. As there is no evidence of Franzen's individual wrongdoing—no evidence for example that he rewrote the guards' manual to eliminate some safety precaution in the event of fire—it may seem that the suit must really be against the office, and hence the state, not against the man. But the plaintiff is the master of his complaint. If he proceeds on a theory that he cannot substantiate factually, he is barred because of his failure of proof, not because another theory which he did not pursue is barred by an immunity. The plaintiffs charged Franzen with personal wrongdoing. Having utterly failed to prove that, they cannot get a judgment against him, but this conclusion has nothing to do with the Eleventh Amendment and does not resolve the liability of the other defendants.

An Illinois statute entitles state employees to be indemnified by the state for damages imposed on them for acts committed in the course of their state employment, unless the employee acted willfully or wantonly. Ill.Rev. Stat. ch. 127, ¶ 1302(d). The defendants argue that the statute makes this a suit against the state, because the state will end up footing the bill for any damage judgment against them. Yet every court that has considered this issue has rejected, rightly in our view, the argument that an indemnity statute brings the Eleventh Amendment into play. See, e.g., *Wilson v. Beebe,* 770 F.2d 578, 588 (6th Cir.1985); *Demery v. Kupperman,* 735 F.2d 1139, 1146-49 (9th Cir.1984); *Downing v. Williams,* 624 F.2d 612, 626 (5th Cir.1980), vacated on other grounds, 645 F.2d 1226 (1981) (per curiam).

Forget about the fact that the statute does not require the state to indemnify for punitive damages (because

awarded only for conduct that is willful or wanton, or much worse); for as a matter of fact the State of Illinois usually indemnifies its employees for such damages and we assume would do so here. Nevertheless the purpose of the Eleventh Amendment is only to protect the state against involuntary liability. If the state chooses to pick up the tab for its errant officers, its liability for their torts is voluntary. It is true that the burden of tort judgments against state employees may eventually come to rest on the state with or without indemnity. If the state doesn't indemnify its officers it may have to pay them higher salaries so that they can buy insurance that will do so. But this type of argument has never succeeded in getting the bar of the Eleventh Amendment extended to suits against state officers in their individual capacities, and anyway is unrelated to the indemnity statute. Moreover, it would be absurd if all a state had to do to put its employees beyond the reach of section 1983 and thereby make the statute ineffectual except against employees of local governments (local government is not protected by the Eleventh Amendment) was to promise to indemnify state employees for any damages awarded in such a suit.

The defendants' last argument under the Eleventh Amendment is that since state law requires the state to pay, and it has paid, the plaintiffs' medical expenses, this suit insofar as it seeks the recovery of such expenses as an item of damages is really against the state. The opposite would be more nearly correct, once it is established that this is a suit against the defendants in their individual rather than official capacities. Insofar as the state has paid medical expenses incurred as a result of the defendants' wrongful acts, the state would have (but for the in-

demnity statute) a claim against the defendants to reimburse it. Its position would be akin to that of a coplaintiff, subrogated to so much of the plaintiffs' claim as seeks reimbursement for medical expenses that the state rather than the plaintiffs has actually borne.

The defendants' alternative argument against liability is that, even viewing the evidence in the light most favorable to the plaintiffs, as of course we must do in appraising the argument, what they did could not reasonably be thought a violation of the Eighth Amendment. Negligence, perhaps; gross negligence — giving due regard for the jury's verdict — perhaps; but not cruel and unusual punishment. This is clear enough with regard to Franzen. Not having been personally involved in the security and safety measures regarding the bus, he is guilty at worst of neglect. But the other two appellants were personally and responsibly involved in securing the bus and in taking or failing to take measures to assure the safety of the prisoners transported on the bus. Their role is analogous to that of the police chief in *McKinnon v. City of Berwyn, supra,* 750 F.2d at 1391, who, having participated in conduct of his subordinate that led to the plaintiff's false arrest and brutal treatment, could be jointly liable with them for violating the plaintiff's civil rights. Still we must decide whether what Wolff and Hert did or failed to do amounted to the infliction of a cruel and unusual punishment.

The constitutional prohibition of "cruel and unusual punishments" apparently was intended, as the words suggest, merely to prohibit barbarous punishments—punishments having the character of torture, see Granucci, *"Nor Cruel and Unusual Punishments Inflicted:" The Original*

Meaning, 57 Calif.L.Rev. 839, 840-42 (1969)—although the Supreme Court has interpreted the historical record somewhat more broadly, see, e.g., *Ingraham v. Wright,* 430 U.S. 651, 664-67, 97 S.Ct. 1401, 1408-10, 51 L.Ed.2d 711 (1977). And originally, of course, the prohibition was only against the federal government's inflicting such punishments, the Bill of Rights not being applicable to the states. But the Supreme Court has decided that freedom from cruel and unusual punishments is one of the liberties secured against state action by the due process clause of the Fourteenth Amendment, and like freedom of speech one of those liberties a state cannot deprive a person of even if does so by impeccable procedures. See, e.g., *Robinson v. California,* 370 U.S. 660, 82 S.Ct. 1417, 8 L.Ed.2d 758 (1962); *Estelle v. Gamble,* 429 U.S. 97, 97 S.Ct. 285, 50 L.Ed.2d 251 (1976).

Even so, the plaintiffs could get nowhere if the words "unusual" and "punishment" were given anything like their normal meanings. The infliction of punishment is a deliberate act intended to chastise or deter. This is what the word means today; it is what it meant in the eighteenth century; Samuel Johnson's *Dictionary of the English Language* (1755) defines "punishment" as "Any infliction or pain imposed in vengeance of a crime." If a guard decided to supplement a prisoner's official punishment by beating him, this would be punishment, and "cruel and unusual" because the Supreme Court has interpreted the term to forbid unauthorized and disproportionate, as well as barbarous, punishments. See *Ingraham v. Wright, supra,* 430 U.S. at 664-67, 97 S.Ct. at 1408-10, summarizing the case law. But if the guard accidentally stepped on the prisoner's toe and broke it, this would not be punishment in anything remotely like the accepted

meaning of the word, whether we consult the usage of 1791, or 1868, or 1985. Again, if a prisoner has a serious illness and the prison staff, though fully aware of the gravity of the illness, refuses to treat it and the prisoner dies, this could well be deemed, and under current case law would be deemed, the infliction of punishment. See, e.g., *Joseph v. Brierton*, 739 F.2d 1244, 1246 (7th Cir. 1984). But if the staff merely misdiagnoses the illness and thinking it trivial does not treat it, and the prisoner dies, this would not be punishment in any accepted meaning of the word even if the diagnosis was negligent. See, e.g., *Benson v. Cady*, 761 F.2d 335, 341 (7th Cir.1985) (dictum).

These are the easy cases; the hard ones are where the behavior of the prison's staff is somewhere in between careless and deliberate infliction of suffering; and we must consider where the line is drawn. The reigning formula of course is "deliberate indifference," e.g., *Jones v. Morris*, 777 F.2d 1277, 1280 (7th Cir.1985), but the term is not self-defining. Indeed, like other famous oxymorons in law—"deliberate speed" for example or "substantive due process"—it evades rather than expresses precise meaning.

The usual intermediate category in law between negligence and deliberateness is recklessness; and reflection on the commonest legal meanings of "reckless" may point us to a solution of our conundrum. One usage, common in tort law, essentially equates recklessness to gross negligence. See Prosser and Keeton on the Law of Torts 214 (5th ed. 1984). If negligence under Judge Learned Hand's formula in *United States v. Carroll Towing Co.*, 159 F.2d 169, 173 (2d Cir. 1947), and in later cases such as *United*

States Fidelity & Guaranty Co. v. Jadranska Slobodna Plovidba, 683 F.2d 1022, 1026 (7th Cir.1982), means that the cost of averting an accident is less, even if just a hair's breadth less, than the expected cost of the accident that would be averted, recklessness in the sense of gross negligence means that the disparity between the cost of prevention and the expected accident cost is great. A quite different sense of recklessness, familiar from criminal law, is the sense in which for example a wrongful, deliberate, and very dangerous act which results in death though death was not intended may be downgraded to second-degree murder, with first-degree murder being reserved for deliberate homicide. A classic example is where the defendant chokes his victim, intending to injure him seriously but not to kill him, but death results. See *Commonwealth v. Marshall*, 287 Pa. 512, 135 A. 301 (1926); LaFave & Scott, Handbook on Criminal Law 568 (1972). The defendant has deliberately committed an act that is at once socially costless to avoid (by not choking his victim in the first place) and highly dangerous. So he is severely punished, for an act that was deliberate and wrongful as well as for a consequence that was lethal though unintended. As this example suggests, recklessness in criminal law implies an act so dangerous that the defendant's knowledge of the risk can be inferred. See Perkins & Boyce, Criminal Law 849-51 (3d ed. 1982).

If the word "punishment" in cases of prisoner mistreatment is to retain a link with normal usage, the infliction of suffering on prisoners can be found to violate the Eighth Amendment only if that infliction is either deliberate, or reckless in the criminal law sense. Gross negli-

gence is not enough. Unlike criminal recklessness it does not import danger so great that knowledge of the danger can be inferred; and we remind that the "indifference" to the prisoner's welfare must be "deliberate," e.g., *Estelle v. Gamble, supra,* 429 U.S. at 104, 97 S.Ct. at 291; *Jones v. Morris, supra,* at 1280, implying such knowledge. Although some cases contain language more suggestive of the tort definition of recklessness than of the criminal law definition, see, e.g., *Benson v. Cady, supra,* 761 F.2d at 339-40; *Estate of Davis v. Johnson,* 745 F.2d 1066, 1071 (7th Cir. 1984); *State Bank v. Camic,* 712 F.2d 1140, 1146 (7th Cir.1983), they are cases where the prisoner had failed to prove recklessness even in the tort sense, and it was not important therefore whether he would have had to prove even more in order to win the case.

The cases where a prisoner complaining of mistreatment has been allowed to recover damages under the Eighth Amendment in fact involve recklessness in the strong sense. For example, if a prisoner tells the prison doctor that he is allergic to penicillin, but the doctor injects him with penicillin anyway and the prisoner has a severe reaction, the doctor is guilty of having inflicted a cruel and unusual punishment; that was our case of *Thomas v. Pate,* 493 F.2d 151, 158 (7th Cir.), vacated and remanded on other grounds under the name of *Cannon v. Thomas,* 419 U.S. 813, 95 S.Ct. 288, 42 L.Ed.2d 39 (1974) (per curiam). But if before injecting him the doctor merely fails to tell the prisoner what is in the syringe, and thus gives the prisoner no chance to alert him to a possible (and quite common) allergy, the doctor is not guilty of violating the Eighth Amendment even if it is a palpable act of medical malpractice to inject someone with

penicillin without first asking him whether he is allergic. Cf. *Estelle v. Gamble, supra,* 429 U.S. at 107, 97 S.Ct. at 292. In the first case the doctor knows there is a great danger, could avert it at trivial cost (though greater than in the case of reckless murder that we gave earlier), but instead ignores it. In the second case the doctor should know there is some danger, but he is inadvertent. Although it is conceivable if improbable that his inadvertence would be deemed unreasonable enough—given the trival burden of inquiry—to make his conduct reckless in a tort sense, punishment cannot be inadvertent. Punishment implies at a minimum actual knowledge of impending harm easily preventable, so that a conscious, culpable refusal to prevent the harm can be inferred from the defendant's failure to prevent it. Such facts "as a history of accidents or a previous request for repairs that had fallen on deaf ears" are therefore important. *Jones v. Morris, supra,* at 1280 n. 5.

In the present case, even if the defendants' conduct was negligent or even grossly negligent, a reasonable and properly instructed jury could not have found it sufficiently reckless to be called punishment. To begin with, the danger of a serious accident, though plain enough in retrospect, was not believed to be great and was not objectively so great that Wolff's and Hert's actual knowledge of the danger can be inferred. There had never been a fire on a prison bus in Illinois. This bus had been in service without incident for more than a year before the fire. The plaintiffs' able counsel presented no evidence of even a single instance in the history of this country (or for that matter any other country) of a fire on a prison bus or other vehicle in which someone was being trans-

ported under restraint. Obviously there have been such fires but they must be exceedingly rare.

Maybe no other bus has even been so hard to get out of in an emergency as this one, but that is unlikely too. The security modifications that resulted in the sealing of the windows, roof hatch, and exits were copied from the buses that the Immigration and Naturalization Service uses to transport illegal aliens under arrest. Apparently none of those buses has ever been involved in an accident in which a prisoner was hurt because he had difficulty getting out of the bus. *McKinnon,* cited earlier, is illustrative of a number of cases where a prisoner was hurt by being banged against the inside walls of a speeding paddy wagon, see 750 F.2d at 1386, but that is an entirely different problem. The plaintiffs point out that the bus involved in the present case made long trips, while INS buses (maybe) operate mostly within cities, but we cannot see what difference that would make. It is the length of time a bus is in use rather than the length of the particular journey that counts in deciding whether the experience of the bus is comparable to that of some other bus, and there is no evidence that the INS uses its buses less than the Illinois prison authorities use theirs.

Although a manual prepared after the security modifications were made alludes to the possibility of fire, states truistically that "a fire which cannot be extinguished immediately should result in the orderly removal of residents [prisoners] from the bus," and adds somewhat omniously, "Under no circumstances should the restraining devices be removed unless a resident's life is in immediate danger," the defendants' foresight should not be the lever that raises their conduct from negligent to reckless. They

realized that there could be a fire on the bus but given the absence of any known history of fires they naturally did not rate the danger high and therefore did not give much thought to the problem that might arise if there were a fire; other problems of prison administration must have seemed much more pressing. In particular they failed to realize that a large group of prisoners who were chained together might have difficulty getting out of the bus. While the chain itself was not fastened to the bus, if one prisoner tripped on his way out—a likely occurrence in conditions of panic, fear, and in this case darkness caused by smoke (but the density of the smoke was hardly foreseeable)—the rest of the group would be stuck; and there were two groups. All this is clear in hindsight. But it was not foreseen. People often fail to foresee disasters of a kind that have not yet occurred and to take effective precautions against them, and ordinarily such lack of foresight is at worst negligence; it certainly is not recklessness in anything like the criminal law sense of the word.

Davis v. United States, 716 F.2d 418 (7th Cir. 1983), a case under the Federal Tort Claims Act, provides an instructive contrast. The plaintiff broke his neck when he dove into a lake in a federal wildlife refuge. The bottom of the lake had dangerous rock outcroppings near the shore. The government had failed to take effective steps to warn the public of the danger even though there had been five similar diving accidents in another and similar lake in the same wildlife refuge in the recent past. We held that the government's failure to warn had been willful and wanton (=grossly negligent) but not willful and malicious. Yet it was a stronger case for the plaintiff than the present case. Here no history of accidents conveyed

an unmistakable warning that the expected accident cost if no further precautions were taken was very high. And while the plaintiffs argue that the statement in the manual about "immediate" danger to life being the only warrant for removing handcuffs puts too much emphasis on security relative to safety and thereby evinces a conscious indifference toward prisoners' lives, they are putting too much emphasis on one word; the passage as a whole suggests a concern for, rather than callousness toward, prisoners' safety.

Not only was the perceived danger not great, but the means of averting it were not simple, obvious, or cheap. Six years after the accident it is still not clear what the defendants should have done if they had thought more carefully about the danger that materialized. They could have forgone the security modifications. But the modifications were in response to a long history of escapes from Illinois prison buses. Thirty-five felons are a dangerous concentration. They cannot be transported with safety to themselves, the community, the driver, or to the guards unless they are manacled and the exits sealed. The modifications were reasonable. The question was what to do, given them, to minimize the danger that the prisoners might be trapped in an accident or a fire.

This is a difficult question, reminding us that "the problems that arise in the day-to-day operation of a corrections facility are not susceptible of easy solutions. Prison administrators therefore should be accorded wide-ranging deference in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security." *Bell v. Wolfish*, 441 U.S. 520, 547, 99

S.Ct. 1861, 1878, 60 L.Ed.2d 447 (1979). The plaintiffs tell us that after the accident the prison authorities put little plaques on the backs of the seats in the bus, telling the prisoners not to panic in the event of an accident or fire; this seems to us a meager palliative, unlikely to have had the slightest effect on what occurred on the day of the fire. The plaintiffs suggest that maybe a device could have been rigged by which the driver or a guard could push a button and release the chain and perhaps the sealed exits and windows. But the record contains no evidence concerning the feasibility, expense, or dangers of such a system (the danger, for example, that a prisoner would reach the button).

Maybe the prisoners shouldn't have been chained to one another. Maybe fewer prisoners should have been transported at one time. The plaintiffs do not press these points on us. Their principal suggestion is—fire drills. This we find impossible to visualize. The bus starts in Joliet and meanders about the state, dropping off prisoners at the various prisons to which they have been assigned after being processed at the intake center at Joliet and picking up prisoners who are being transferred to other prisons. The logic of the plaintiffs' argument is that every time the bus picked up a new passenger there would have to be a new fire drill. Guards would have to surround the bus to make sure the prisoners didn't use the occasion of the fire drill to run away. Maybe, despite these objections, prison bus fire drills are a good idea but they are not so simple and obvious a one that the failure to have conducted them—before there had been an accident—convicts the defendants of a deliberate indifference to the safety of their charges. The record contains no evi-

dence about precautions used by other prison systems. It is of course possible that the fault here lay not with the officials responsible for the security and safety arrangements of the bus but with the guards who reacted slowly to the fire and failed to release the chains that bound the prisoners in clumsy groups—not to mention the guard who forced one prisoner back into the bus. But the jury exonerated the guards and the plaintiffs have not appealed from that part of the judgment.

We know the cases in which prison officials have been ordered to take steps to remove fire hazards, and we acknowledge that in some of them little attention was paid to the question whether the hazards were so great as to amount to cruel and unusual punishment. See, e.g., *Hoptowit v. Spellman,* 753 F.2d 779, 783-84 (9th Cir. 1985); *Santana v. Collazo,* 714 F.2d 1172, 1183 (1st Cir.1983); *Leeds v. Watson,* 630 F.2d 674, 675-76 (9th Cir. 1980); *Battle v. Anderson,* 564 F.2d 388, 395 (10th Cir. 1977). In others, however, this essential requirement for liability was properly stressed. See e.g., *Shrader v. White,* 761 F.2d 975, 984-86 (4th Cir.1985); *Ruiz v. Estelle,* 679 F.2d 1115, 1152-53 (5th Cir.1982), modified, 688 F.2d 266, 267 (1982) (per curiam). The latter decisions (amongst which we include our recent decision in *French v. Owens,* 777 F.2d 1250, 1257 (7th Cir.1985), where we said, "The eighth amendment does not constitutionalize the Indiana Fire Code") we consider better reasoned. But in any event the cases that involve equitable remedies against fire hazards in prisons are distinguishable from this case. Prison fires, as distinct from prison *bus* fires, are common and both their hazards and the necessary precautions well known. A judgment of reckless disregard for prisoners' safety is

therefore easier to make. And there is a difference between a suit to remove a fire hazard and a suit for damages after a fire has occurred. In the former case the filing of the suit puts the prison officials on notice of a potential hazard; and if the hazard is demonstrated, yet they refuse to do anything, maybe that is evidence of a reckless disregard for safety.

The district judge should have granted judgment for the defendants notwithstanding the jury's verdict; obviously the cross appeal by the individual plaintiffs who complain that the damages the jury awarded were inadequate must be dismissed. The defendants' complaints about the jury instructions and evidentiary rulings are moot.

That leaves only the question whether the judge was right to dismiss the pendent claim. He thought it barred by the Eleventh Amendment. But if, as he and we believe, the civil rights claim was brought against the defendants in their individual capacities, we can think of no reason for believing that the pendent negligence claim was brought against them in their official capacities; nor do the defendants suggest any reason. The judge hinted that he might have dismissed the pendent claim anyway because the jury might be confused if it had to consider the defendants' liability under both the Eighth Amendment and the common law of negligence. But we do not understand this either. The plaintiff in a personal injury case will often allege different levels of culpability, ranging upward from negligence, in the hope of getting punitive as well as compensatory damages or of defeating defenses such as comparative or contributory negligence that are effective only against the lesser forms of cul-

pability. This has never been thought a source of serious confusion. The almost complete factual overlap between the main and pendent claims in the present case makes this a natural case for the retention rather than relinquishment of pendent jurisdiction; and while the district judge has a broad discretion in making what amounts to a managerial judgment on whether to allow a plaintiff to bring one case in federal court or force him to litigate his state claim in state court, we cannot uphold an exercise of discretion so flawed as the one before us.

But what to do about this is another question. Since we are ordering the federal claim dismissed, since pendent party jurisdiction cannot be used to reattach the pendent negligence claim to the plaintiffs' diversity claim against the bus company, *Hixon v. Sherwin-Williams Co.*, 671 F.2d 1005, 1007-09 (7th Cir.1982), and since pendent claim jurisdiction should normally be relinquished when the federal claim is dismissed before trial, see *United Mine Workers v. Gibbs,* 383 U.S. 715, 726, 86 S.Ct. 1130, 1139, 16 L.Ed.2d 218 (1966), it would seem that a remand to the district court to reconsider his ruling on pendent jurisdiction could have but one result: the dismissal of the pendent claim.

But two considerations argue against this result. The first, and lesser, is that where there has been a trial, considerations of judicial economy may support retention of the pendent claim for any further trial proceedings, as we said in *Cenco Inc. v. Seidman & Seidman,* 686 F.2d 449, 458-59 (7th Cir.1982). But that was a case where the pendent as well as main claims had been tried once, and the question was whether the retrial was to be in federal or state court; even then we noted reasons for relinquish-

ing pendent jurisdiction—which the district judge in fact did on remand. See *In re Cenco Inc. Securities Litigation*, 601 F.Supp. 336, 342-44 (N.D. Ill.1984).

Second, and more important, the statute of limitations has run on the pendent claim. This is a conventional reason against relinquishing pendent jurisdiction after dismissal of the main claim. See, e.g., *O'Brien v. Continental Illinois Nat'l Bank & Trust Co.*, 593 F.2d 54, 65 (7th Cir.1979); *Joiner v. Diamond M Drilling Co.*, 677 F.2d 1035, 1043 (5th Cir.1982). Ordinarily, however, it is not a reason in the federal courts of Illinois. An Illinois statute provides that a case dismissed by a federal court on jurisdictional grounds—and a relinquishment of pendent jurisdiction is jurisdictional—can be refiled within a year in state court, and in the interim the statute of limitations will stop running. Ill.Rev.Stat. ch. 110, ¶ 13-217; see *Bernstein v. Lind-Waldock & Co.*, 738 F.2d 179, 188 (7th Cir.1984). But this particular provision became effective in 1980, after this suit was brought. We know the provision would not be applied retroactively to revive a time-barred cause of action, see *Conner v. Copley Press, Inc.*, 99 Ill.2d 382, 388, 76 Ill.Dec. 820, 822, 459 N.E.2d 955, 957 (1984), but the plaintiffs' suit was not time-barred when the provision was enacted. Even if the new provision is applicable, however, another obstacle looms: the one-year period in an earlier but materially identical statute was held to begin running when the case was dismissed rather than when the dismissal was affirmed. See *Hupp v. Gray*, 73 Ill.2d 78, 22 Ill.Dec. 513, 382 N.E.2d 1211 (1978). If this ruling applies to the current statute, as well it may, the period for filing suit in state court has long since run out.

Given these uncertainties, on remand the district judge should not dismiss the pendent claim unless the defendants agree to waive their statute of limitations defense in state court. See *Financial General Bankshares, Inc. v. Metzger*, 680 F.2d 768, 778 (D.C.Cir.1982). This point is applicable, by the way, to all the defendants, not just the three who are the appellants. With regard to retention of a pendent claim in order to prevent the bar of the statute of limitations from falling, it does not matter when the main claim is dismissed; it certainly does not matter whether it is after trial (as in the case of the three guards) or after appeal (as in the case of the three officials who are the appellants.

We reverse the district judge's judgment for plaintiffs with directions to dismiss the federal claims with prejudice, but we also reverse the judgment insofar as it dismissed the pendent claim. The plaintiffs have lost their constitutional tort suit against the six defendants involved in this appeal but their common law tort suit against them remains alive. The case is remanded for further proceedings consistent with this opinion; no costs in this court.

Reversed and Remanded.

EXHIBIT B

UNITED STATES COURT OF APPEALS

For the Seventh Circuit
Chicago, Illinois 60604

February 5, 1986.

Before

Hon. WILLIAM J. BAUER, Circuit Judge
Hon. RICHARD A. POSNER, Circuit Judge
Hon. FRANK H. EASTERBROOK, Circuit Judge

JUNIOR RAY DUCKWORTH, et al., Plaintiffs-Appellees, Cross-Appellants,	Appeals from the United States District Court for the Southern District of Illinois, Alton Division.
Nos. 85-1010, 85-1053, v 85-1084, 85-1095	No. 80 C 5057
GAYLE FRANZEN, et al, Defendants-Appellants, Cross-Appellees.	William L. Beatty, *Judge.*

ORDER

On January 2, 1986, both plaintiffs-appellees and defendants-appellants filed petitions for rehearing with suggestion for rehearing *en banc*. All of the judges on the original panel have voted to deny the petitions, and none of the active members of the court has requested a vote on the suggestion for rehearing *en banc*. The petitions are therefore DENIED.

Supreme Court, U.S.
FILED
JUL 26 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-1820

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

JUNIOR RAY DUCKWORTH, et al.,

Petitioners,

vs.

GAYLE FRANZEN, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION

NEIL F. HARTIGAN
Attorney General, State of Illinois
ROMA JONES STEWART
Solicitor General, State of Illinois
100 West Randolph Street, 12th Floor
Chicago, Illinois 60601
(312) 917-3000
Attorneys for Respondents

JEFFREY W. FINKE*
Assistant Attorney General
General Law Division
100 West Randolph Street, 13th Floor
Chicago, Illinois 60601
(312) 917-5694
* Counsel of Record

Printed by Authority of the State of Illinois (P.O. 33313—75—7-25-86)

21pp

QUESTIONS PRESENTED

The questions presented for review are more properly stated as follows:

1. Whether senior corrections officials may be found liable under the Eighth Amendment for allegedly failing to anticipate an accident in the absence of any prior warning of harm?

2. Alternatively, whether the law was clearly established in 1979 that the alleged failure of senior corrections officials to anticipate an accident constitutes an Eighth Amendment violation in the absence of any prior warning of harm?

PARTIES TO THIS PROCEEDING

The petitioners are Junior Ray Duckworth, Michael A. Mullins, William Woodward, Daniel Hines, Freddie Brown, Emmett Leatherwood, Rudolph Moffett, Ben Cantrell and Robert Osborne.

The respondents are Gayle Franzen, in his capacity as Director of the Illinois Department of Corrections; Dennis J. Wolff, in his capacity as Warden of the Joliet Correctional Center; and Richard R. Hert, in his capacity as Chief of Security of the Joliet Correctional Center.

TABLE OF CONTENTS

	PAGE
QUESTIONS PRESENTED	i
PARTIES TO THIS PROCEEDING	ii
TABLE OF AUTHORITIES	iv
STATEMENT OF THE CASE	2
REASONS FOR DENYING THE WRIT	7
I.	
THE ALLEGED FAILURE OF SENIOR ADMINISTRATIVE CORRECTIONS OFFICIALS TO ANTICIPATE A HIGHLY UNUSUAL ACCIDENT ABOARD A MAXIMUM SECURITY PRISON BUS IN THE ABSENCE OF ANY PRIOR WARNING OF HARM MAY NOT PROPERLY BE MADE THE BASIS FOR A FINDING THEY HAVE INFLICTED CRUEL AND UNUSUAL PUNISHMENT IN VIOLATION OF THE EIGHTH AMENDMENT	7
II.	
ALTERNATIVELY, DEFENDANTS ARE ENTITLED TO QUALIFIED IMMUNITY FROM LIABILITY FOR MONEY DAMAGES	13
CONCLUSION	14

TABLE OF AUTHORITIES

Cases	PAGE
Anderson v. City of Atlanta, 778 F.2d 678 (11th Cir. 1985)	11
Cornman v. Eastern Counties Railway Co., 4 H. & N. 781, 157 Eng. Rep. 1050 (1859)	8
Duckworth v. Franzen, 780 F.2d 645 (7th Cir. 1985)	1, 3, 9, 10
Estelle v. Gamble, 429 U.S. 97 (1976)	9, 10, 12, 14
Gamble v. Estelle, 554 F.2d 653 (5th Cir.), *cert. denied*, 434 U.S. 974 (1977)	9
Haygood v. Younger, 769 F.2d 1350 (9th Cir. 1985), *cert. denied*, 54 U.S.L.W. 3866 (7/7/86)	11
Miller v. Solem, 728 F.2d 1020 (8th Cir.), *cert. denied*, 469 U.S. ____, 105 S.Ct. 145 (1984)	11
Mitchell v. Forsyth, 472 U.S. ____, 105 S.Ct. 2806 (1985)	14
Neely v. Eby Construction Co., 386 U.S. 317 (1967)	12
Rhodes v. Chapman, 452 U.S. 337 (1981)	12
Riley v. Jeffes, 777 F.2d 143 (3d Cir. 1985)	11
Roberts v. City of Troy, 773 F.2d 720 (6th Cir. 1985)	11
Thomas v. Pate, 493 F.2d 151 (7th Cir.), *vacated and remanded on other grounds*, 419 U.S. 813 (1974)	10
United States v. Generes, 405 U.S. 93 (1972)	12
Whitley v. Albers, 475 U.S. ____, 106 S.Ct. 1078 (1986)	10

Constitutional Provision

U.S. Const. amend. VIII ..... *passim*

Federal Rules

Rule 407 of the Federal Rules of Evidence ... 12

Treatise

W. Keeton, *Prosser and Keeton on Torts* (5th ed. 1984) 8

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

JUNIOR RAY DUCKWORTH, et al.,

Petitioners,

vs.

GAYLE FRANZEN, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION

Respondents respectfully request that this Court deny petitioners' Petition for a Writ of Certiorari in No. 85-1820 seeking review of the Seventh Circuit's judgment on the Eighth Amendment issues in this case. The Court of Appeals opinion is reported at 780 F.2d 645 (1985).

(Separately, defendant Gayle Franzen and five other Department of Corrections defendants have petitioned this Court for a Writ of Certiorari in No. 85-1806 seeking review of the Seventh Circuit's judgment concerning the pendent state claims in this case.)

STATEMENT OF THE CASE

In their Statement of the Case, the prisoners omitted a number of significant facts. The following is a more complete summary of the evidence.

This case arose from an accidental fire aboard a maximum security over-the-road prison transport bus used by the Illinois Department of Corrections. One investigative report found that the fire was caused by a lit cigarette stuffed into one of the air vents in the prisoners' section of the bus. (R. 82a, Appendix 1). Another report concluded that the fire was caused by a defect in the air conditioning and ventilating system of the bus. (*id.*, Appendix 2). There is no allegation that any of the State of Illinois defendants were in any way responsible for the cause or spread of the fire.

The person in charge of the bus transfer on the day in question, November 29, 1979, was Lieutenant Larry Woods. His job was to design and implement the procedures for the bus transfer operation, personally supervise the inmate transfers, and report any problem in the transfer operation to his supervisors. Neither Lt. Woods (nor for that matter anyone else) ever reported any problem with the transfer operation to anyone. The plaintiffs never sued Lieutenant Woods.

Lt. Woods supervised three prison guards on the day in question, namely, defendants John Tipton, James Krug, and William Hartgrove. All three were highly experienced and had been involved in many inmate transfers. (Plaintiffs' Opening Brief in the Court of Appeals, p. 4). Defendant Tipton had also served as a part-time volunteer fireman for more than twenty years. (Tr. 203-204).

In addition to the three guards there were three other defendants: Gayle Franzen, Director of the Illinois Department of Corrections; Dennis Wolff, a prison warden; and Richard Hert, a security chief. Director Franzen headed a department of more than 7,000 employees and 13,000 inmates. (Tr. 872). As Director, he was not and could not be personally involved in each and every departmental activity. The undisputed evidence is that he had no involvement with any aspect of the bus transfer operation.

Defendant Wolff was the Warden of the Joliet Correctional Center. He had 400 to 500 employees working under his general supervision. (Tr. 155). Defendant Wolff was not responsible for supervising the bus transfer operation. The only personal involvement Warden Wolff had was to order that the over-the-road bus (similar to a Greyhound bus) be equipped with appropriate security modifications due to the long history of escapes from Illinois prison buses. (780 F.2d at 654). The security modifications selected were suggested by a private firm and were identical to those that the firm had previously placed on 14 United States Immigration & Naturalization Service buses. (Tr. 134, 136-137). Warden Wolff testified that his concern was to secure the bus, but not to make it unsafe. (Tr. 144). No one ever reported any problem concerning any aspect of the bus transfer operation to him.

Defendant Hert was in charge of security for the entire Joliet Correctional Center. In his position he oversaw a large staff of prison guards and intermediate supervisors. Security for the bus transfers was handled by a captain, two lieutenants, and several prison guards. (Tr. 161). Major Hert's administrative job did not include personal supervision of the bus operation. Major Hert testified that he had assigned two of his transfer bus lieutenants to draft a transfer bus security procedures manual.

These lieutenants, one of whom was Lieutenant Larry Woods, were the people most intimately familiar with the transfer bus procedures because the transfer of inmates was their daily work. (Tr. 167).

On the day in question, each prisoner was handcuffed to his seatmate and connected to a chain which ran between each pair of prisoners' handcuffs from the front to the back of the bus. The prisoners on the right side of the bus were placed on one chain and the prisoners on the left side of the bus were placed on another. Neither chain was connected to the bus in any manner, but rather slid up and down between the inmates through a ring between each set of cuffs. In order to prevent inmates from detaching themselves from the chain, a padlock was placed at the front end and a larger ring was placed at the back end of the chain. Two guards on the bus kept a key to the padlock as did the lieutenant in the follow car who directed and controlled the transfer. This arrangement permitted the prisoners on each side of the bus to get up quickly and walk off the bus together when told to do so by the guards, yet prevented the prisoners from running off in different directions if, for example, there was a need to have the prisoners leave the bus somewhere along the open highway. It also permitted the quick exit of pairs of inmates off the chain after the padlock was unlocked. (Tr. 187).

On November 29, 1979, after the bus had covered over two hundred miles that day without incident, smoke first appeared. Although not all of the witnesses agreed as to the precise time that smoke was first spotted in the bus, the majority testified that it was first detected after the bus had stopped at the Vandalia Correctional Center waiting to pick up new passengers. (Tr. 195). Within a very short period after initial detection, dark smoke came out

of the air vents and spread rapidly throughout the bus. (Tr. 197). Despite the smoke, however, there never was any fire in the passenger area of the bus.

Although there was minor disagreement in the testimony, the evidence was nonetheless clear that the prisoners on the right side of the bus got off the bus in a very short time all linked together on the chain. (Tr. 216). Indeed, the physical injuries claimed by the prisoners on the right side of the bus were either nonexistent or relatively minor. The prisoners on the left side of the bus for the most part, though, took longer to get off because they had panicked and rushed forward in disarray, tangling their chains in the process and not permitting the guards to get to the padlock to release the chain. Some inmates had to be carried out. All prisoners requiring medical care received immediate attention and there is no claim that the medical care received by the prisoners was inadequate.

The case went to the jury on two issues: (1) the prisoners alleged the transfer bus policies were not properly enforced on the day in question and (2) the prisoners alleged the transfer bus policies were inadequate. (Court's Jury Instruction No. 1). The jury exonerated the three prison guards who were responsible for enforcing the transfer bus policies on the day of the accident. The prisoners never sued the transfer bus lieutenants and their supervisor, the transfer bus captain, who were responsible for designing and implementing the transfer bus policies and who were most familiar with the transfer bus operation.

The jury instead found Director Franzen, Warden Wolff, and Security Chief Hert liable for inflicting cruel and unusual punishment upon the prisoners who happened to be on the bus that day, despite the fact that these three senior administrative officials were hundreds of miles

away from the bus on the day of the accident. The jury assessed the highest punitive damages against Director Franzen even though he had no involvement with any aspect of the transfer bus operation.

None of the defendants ever received any notice of any risk of harm. To the contrary, the bus with security modifications had been in operation for over 13 months prior to the date of the accident; there had been over 100 prior bus transfer trips all without any problem or incident. (Tr. 966). The security procedures and modifications were needed to prevent escapes, to prevent attacks on the bus driver, to prevent attacks on other prison employees and other prisoners, to prevent smuggling of weapons through open windows, and to prevent potential hostage situations. (Tr. 142, 183, 184, 444).

There had never before been a prison bus fire in Illinois or anywhere else. (780 F.2d at 653). Nor was the accident reasonably foreseeable. Plaintiffs conceded that the dense smoke which suddenly came out of the bus' air conditioning vents could not have been reasonably foreseen by any of the defendants (Plaintiffs' Opening Brief in the Court of Appeals, pp. 21, 30), much less these senior administrators who were in no way involved with the operation of the bus.

Although a few of the prisoners claimed that a guard prevented an inmate from leaving the bus after the fire started, the jury disbelieved the plaintiffs. And the plaintiffs did not appeal the jury's finding that the prison guards did not violate the Eighth Amendment.

The Court of Appeals held that Director Franzen, Warden Wolff, and Security Chief Hert did not violate the Eighth Amendment.

REASONS FOR DENYING THE WRIT

I.

THE ALLEGED FAILURE OF SENIOR ADMINISTRATIVE CORRECTIONS OFFICIALS TO ANTICIPATE A HIGHLY UNUSUAL ACCIDENT ABOARD A MAXIMUM SECURITY PRISON BUS IN THE ABSENCE OF ANY PRIOR WARNING OF HARM MAY NOT PROPERLY BE MADE THE BASIS FOR A FINDING THEY HAVE INFLICTED CRUEL AND UNUSUAL PUNISHMENT IN VIOLATION OF THE EIGHTH AMENDMENT.

Plaintiffs spent the vast majority of their time at trial attempting to show that the prison guards assigned to the transfer bus on the day of the accident (i.e., defendants Tipton, Krug, and Hartgrove) failed to enforce the transfer bus policies and regulations and failed to promptly evacuate the prisoners from the bus. (Court's Jury Instruction No. 1). The jury rejected these claims by finding defendants Tipton, Krug and Hartgrove not liable; the prisoners did not appeal these verdicts.

Now that the jury has rejected the prisoners' claims that the guards failed to enforce the transfer bus procedures, plaintiffs argue that this case is really about the adequacy of those procedures. Gayle Franzen, Dennis Wolff and Richard Hert are the persons personally responsible for those procedures according to plaintiffs since they were the Director of the Department of Corrections, the Warden of the Joliet Correctional Center and its Security Chief, respectively. Yet plaintiffs assert nothing more than a *respondeat superior* theory of liability against these defendants. Plaintiffs contend that these three senior administrative officials had a global duty to "anticipate accidents" anywhere at anytime throughout the entire State when those accidents involve any of the 13,000 prisoners in the Department. (Plaintiffs' Opening Brief in the Court of Appeals, p. 25).

The prisoners contend that the bus transfer procedures were inadequate and that these senior supervisory defendants somehow should have known that purported fact. Plaintiffs further assert that these defendants are liable because "in the natural and probable sequence of events" "the risks were foreseeable." (*id.* p. 21).

But foreseeability cannot be proved with the benefit of hindsight even in the much less stringent context of a negligence lawsuit: "Nothing is so easy as to be wise after the event." W. Keeton, *Prosser and Keeton on Torts*, sec. 31, at 170 n. 16 (5th ed. 1984) quoting *Cornman v. Eastern Counties Railway Co.*, 4 H. & N. 781, 786, 157 Eng. Rep. 1050, 1052 (1859) (Bramwell, B.).*

Despite these arguments, however, plaintiffs declined to sue the very persons that had been personally responsible for both the drafting and the implementation of all the security procedures aboard the bus—the transfer Lieutenants. Rather, they sued Director Franzen, Warden Wolff and Security Chief Hert without a shred of evidence that these defendants had any awareness of any likelihood of harm to prisoners aboard the bus. The only evidence in the record is that prior to the installation of the security modifications on the bus violent felons had escaped; one prisoner had climbed right out the window. (Tr. 142, 184). The undisputed record further shows that as of the day in question, November 29, 1979, the security modifications and fire safety procedures used in prison transfers

---

* Defendants, of course, in no way concede that they were negligent. The security modifications at issue here were absolutely essential for the safety of the residents of Illinois, Department of Corrections personnel, and the prisoners themselves. Moreover, plaintiffs failed to show that as of November 29, 1979, the day in question, that any corrections department anywhere in the country had any better bus transfer procedures in effect for the long-distance transfer of violent felons.

had been in use for over 13 months and that over 100 trips had been made without incident. (Tr. 966). The accident in question was the first prison bus fire in the history of not only the State of Illinois, but the nation. (780 F.2d at 653).

There is not a single Eighth Amendment case which holds state officials liable on the prisoners' novel "should-have-known" standard. In every Eighth Amendment case where liability was imposed, the defendants had actual notice of the potential for harm.

Indeed, in their Petition for Certiorari in this case, the prisoners acknowledge that *Estelle v. Gamble*, 429 U.S. 97 (1976) sets forth the proper Eighth Amendment standard. In particular, the plaintiffs argue that although the Seventh Circuit cited *Estelle v. Gamble*, the Court of Appeals allegedly failed to follow its teaching. (Plaintiff's Petition for Certiorari, pp. 6-10).

In *Estelle v. Gamble*, however, this Court specifically rejected the very theory that the prisoners rely upon in this case—that Eighth Amendment liability may be imposed upon prison officials on the basis that defendants arguably should-have-known better. In *Estelle*, this Court accepted as true plaintiff's claims that he failed to receive proper medical treatment for his back injury for which he was experiencing daily pain and suffering. (*id.* at 107). The prison doctors told plaintiff that he was in "first class" medical condition despite his disabling back injury. (*id.* at 101). Nevertheless, this Court dismissed plaintiff's claim against the prison medical director. (*id.* at 108). Following this Court's reasoning, the Court of Appeals on remand dismissed as a matter of law plaintiff's claims against the Director of the Department of Corrections and the prison warden. *Gamble v. Estelle*, 554 F.2d 653 (5th Cir.), *cert. denied*, 434 U.S. 974 (1977).

In describing the appropriate Eighth Amendment standard, this Court gave as an example of deliberate indifference the outright refusal to provide medical treatment as well as the injection of penicillin with knowledge that the prisoner was allergic and refusal of the doctor to treat the subsequent allergic reaction. See 429 U.S. at 104 n. 10 citing *Thomas v. Pate*, 493 F.2d 151, 158 (7th Cir.), *vacated and remanded on other grounds, Cannon v. Thomas*, 419 U.S. 813 (1974). The *Thomas* decision was expressly relied upon by the Seventh Circuit in this case. (780 F.2d at 653).

In holding that an allegation of inadequate medical treatment does not state an Eighth Amendment claim (429 U.S. at 105), this Court stated (*id.* at 107):

> "[T]he question whether an X-ray—or additional diagnostic techniques or forms of treatment—is indicated is a classic example of a matter for medical judgment. A medical decision not to order an X-ray, or like measures, does not represent cruel and unusual punishment. At most it is medical malpractice, and as such the proper forum is the state court."

More particularly, an accident as happened in this case, is not actionable under the Eighth Amendment (*id.* at 105):

> "An accident, although it may produce added anguish, is not on that basis alone to be characterized as wanton infliction of unnecessary pain."

The instant case is much weaker for plaintiffs than *Estelle* in that in *Estelle* the prisoner himself gave notice of the claimed harm. In this case, there was absolutely no notice given by anyone.

Although plaintiffs acknowledge that this Court in *Whitley v. Albers*, 475 U.S. ____, ____, 106 S.Ct. 1078, 1085 (1986) expressly approved the Seventh Circuit's deci-

sion in this case, plaintiffs characterize such approval as "unfortunate[ ]." (Plaintiffs' Petition for Certiorari, p. 9).

Moreover, despite plaintiffs' contention that the Seventh Circuit engaged in "a shocking and incomprehensible piece of improper judicial activism" (*id.*, p. 11), it is the plaintiffs who seek to create an Eighth Amendment standard of liability wholly without precedent. Under plaintiffs' theory, senior corrections officers may be found guilty of inflicting cruel and unusual punishment upon prisoners who are unknown to them based upon a standard of absolute liability for the acts of subordinates in the absence of any prior warning of harm.

The handful of cases cited by plaintiffs (*id.*, pp. 7-9) are clearly not in conflict with the Seventh Circuit's decision in this case; to the contrary, they are in complete accord with this decision. In *Roberts v. City of Troy*, 773 F.2d 720, 722, 725 (1985) the Sixth Circuit held that a police chief's failure to promulgate and enforce procedures sufficient to prevent prisoner suicides does not amount to an Eighth Amendment violation. Similarly, in *Anderson v. City of Atlanta*, 778 F.2d 678, 688-89 (1985), the Eleventh Circuit granted judgment notwithstanding the verdict in favor of the Director of the Atlanta Bureau of Corrections in a case where an inmate died in his prison cell. In *Miller v. Solem*, 728 F.2d 1020 (8th Cir.), *cert. denied*, 469 U.S. ____ , 105 S.Ct. 145 (1984) the Court of Appeals granted summary judgment in favor of all prison officials in an inmate-on-inmate assault case. Finally, in *Haygood v. Younger*, 769 F.2d 1350, 1355 (9th Cir. 1985), *cert. denied*, 54 U.S.L.W. 3866 (7/7/86) and *Riley v. Jeffes*, 777 F.2d 143, 146 (3d Cir. 1985) the record and the pro se prisoner's complaint, respectively, made clear that defendants had received prior notice that the plaintiff had been or likely would be harmed.

Thus the Seventh Circuit's decision in this case is completely consistent not only with this Court's decision in *Estelle v. Gamble*, 429 U.S. 97 (1976) but also every other appellate decision as well. Under these circumstances, the Seventh Circuit properly granted judgment notwithstanding the verdict in favor of defendant senior administrative corrections officials. *United States v. Generes*, 405 U.S. 93, 106-107 (1972) (judgment notwithstanding the verdict in favor of defendant granted by this Court); *Neely v. Eby Construction Co.*, 386 U.S. 317, 326, 329-30 (1967) (affirmed entry by Court of Appeals of judgment notwithstanding the verdict in favor of defendant).

More particularly, as part of the prisoners' newly conceived claim that the Seventh Circuit applied an incorrect standard of law, they assert that under such a standard they should be permitted to get into evidence the post-remedial acts taken by the Illinois Department of Corrections. (Plaintiffs' Petition for Certiorari, p. 10). But Rule 407 of the Federal Rules of Evidence makes plain that subsequent remedial measures are not admissible. Moreover, in *Rhodes v. Chapman*, 452 U.S. 337, 348 n. 13 (1981) this Court noted that opinions of experts as to appropriate conditions of prison confinement do not establish the requisite Eighth Amendment standard.

Finally, although there were conflicts in the testimony concerning the alleged acts or omissions of the prison guards (whose nonliability is not before this Court) there was no dispute with respect to any fact issue relating to the Director, Warden, or Security Chief. Plaintiffs presented no evidence to contradict anything these three defendants said. Most significantly, the prisoners point to no evidence that any of these three senior administrative officials had any prior warning of harm. Indeed, the evidence was just the opposite. The undisputed testimony

is that as of the day in question, November 29, 1979, the security modifications and fire safety procedures used in the prison bus transfer program had been in use for over 13 months and that over 100 trips had been made without incident. (Tr. 851-852, 966). Significantly, the prisoners concede as much by arguing that these three senior administrative officers had a duty to "anticipate accidents" anywhere at anytime throughout the entire State which might affect any of the Department's 13,000 prisoners. (Plaintiffs' Opening Brief in the Court of Appeals, p. 25). In particular, the prisoners argue that the Eighth Amendment renders the Director responsible for the acts or omissions of the 7,000 subordinate employees in the Department of Corrections despite the total absence of any prior notice of risk of harm. (Tr. 872).

Consequently, there are no conflicting facts or credibility issues concerning the alleged Eighth Amendment liability of the Director, the Warden, and the Security Chief. The Seventh Circuit clearly reached the correct result in granting judgment notwithstanding the verdict in favor of Director Franzen, Warden Wolff, and Security Chief Hert.

II.

ALTERNATIVELY, DEFENDANTS ARE ENTITLED TO QUALIFIED IMMUNITY FROM LIABILITY FOR MONEY DAMAGES.

No court has ever ruled that the alleged failure of senior corrections officials to have their subordinates promulgate adequate procedures so as to anticipate a highly unusual accident aboard a maximum security over-the-road prison bus constitutes an Eighth Amendment violation in the absence of any prior warning of harm. *A fortiori,* as of November 29, 1979, the date of the accident, the law was not clearly established that the foregoing conduct purportedly consti-

tuted an Eighth Amendment violation. Accordingly, defendants Franzen, Wolff, and Hert are entitled to qualified immunity from money damage liability. *Mitchell v. Forsyth*, 472 U.S. ____, ____, 105 S.Ct. 2806, 2818-20 (1985).

CONCLUSION

The Seventh Circuit's decision to grant judgment notwithstanding the verdict is fully consistent with this Court's Eighth Amendment holding in *Estelle v. Gamble*, 429 U.S. 97 (1976). Moreover, the defendants are entitled to qualified immunity from damage liability.

Accordingly, the Petition for Writ of Certiorari in No. 85-1820 should be denied.

(Separately, defendants' Petition for Writ of Certiorari in No. 85-1806 which concerns the pendent state claims should be granted for the reasons set forth in that Petition.)

Respectfully submitted,

NEIL F. HARTIGAN
Attorney General, State of Illinois

ROMA JONES STEWART
Solicitor General, State of Illinois
100 West Randolph Street, 12th Floor
Chicago, Illinois 60601

Attorneys for Respondents

JEFFREY W. FINKE *
Assistant Attorney General
General Law Division
100 West Randolph Street, 13th Floor
Chicago, Illinois 60601

* Counsel of Record